

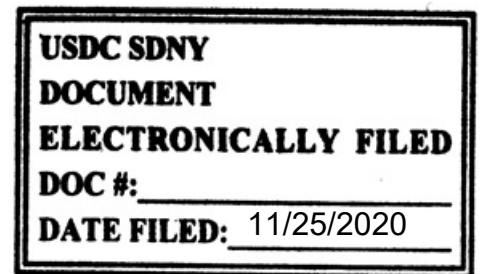


80 BROAD STREET, 23RD FLOOR
NEW YORK, NEW YORK 10004
(212) 509-3456 – TELEPHONE
(212) 509-4420 – FACSIMILE
www.mkcilaw.us.com

November 22, 2020

VIA ELECTRONIC FILING (ECF)

Honorable Robert W. Lehrburger
United States Magistrate Judge
Southern District of New York
500 Pearl St.
New York, NY 10007-1312



Re: ***Wang v. Verizon Communications Inc., et al.***
U.S. District Court, S.D.N.Y., Case No. 1:19-cv-09506-JMF-RWL
Request for Clarification and to Vacate Scheduling Order

Dear Judge Lehrburger:

I respectfully submit this letter on behalf of Defendants, to request clarification that the Court's Scheduling Order has been vacated in light of (1) the Court's October 8th Order granting Defendants' motion to dismiss the Amended Complaint (ECF 131), and (2) the Court's October 27th Order granting Plaintiff Hao Zhe Wang's motion for extension of time to file a second amended complaint (ECF 133).

Background

On September 4, 2020, during the pendency of Defendants' motion to dismiss the First Amended Complaint ("FAC"), Your Honor entered an order that "Discovery as to the 25 Defendants who Defendants assert have no involvement in the matter in dispute is stayed until resolution of the motion to dismiss." (ECF 106) ("September 4th Order). However, the Order permitted discovery as to the remaining defendant, Verizon New England Inc. ("VNE"), without prejudice to file a future application for adjustment based on a change in circumstances. *Id.*

{N1003813-1} FLORHAM
PARK, NJ
(973) 822-1110
NEW YORK, NY
(212) 509-3456

HARTFORD, CT
(860) 404-3000
PHILADELPHIA, PA
(215) 557-1990

WILMINGTON, DE
(302) 656-1200

SPARTA, NJ
(973) 726-4958

SYRACUSE, NY
(315) 473-9648

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On October 8, 2020, the Court then entered an Order granting the Defendants' motion to dismiss Plaintiff's FAC (ECF 78) as to all claims and all Defendants, including VNE (ECF 131 at p. 4 of 5, FN 3 (the Court "dismiss[ed] [Plaintiff's] claims against all Defendants, not just the Moving Defendants"). Plaintiff was provided 30 days' leave to file any amended complaint, or until November 9, 2020.¹ *Id.* at p. 5 of 5. There is currently no operative complaint on file.

Most recently, on October 27, 2020 the Court granted to Plaintiff a further 42 day extension of time to file a Second Amended Complaint ("SAC") from November 9th to December 21, 2020.

Request for Confirmation Regarding Vacation of Scheduling Order

As there is no longer any operative pleading on file given the Court's October 8th Order dismissing all claims against all Defendants, without prejudice, we write now, in an abundance of caution, to be sure that we are not currently, or in the near future, facing any of the deadlines proscribed in this court's scheduling order. Importantly, the FAC was dismissed because it did not comply with Fed. R. Civ. P. 8, which divested Plaintiff of the right to discovery. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1941 (2009) ("[B]ecause Iqbal's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise."). Indeed, the absence of any operative pleading or claims against any defendant, including VNE, renders it impracticable to frame the scope of relevant discovery and litigation of the Parties' claims and defenses in this case.

Moreover, while perhaps obvious and implicit with the dismissal, the current lack of an operative complaint in this case, and the Court's October 27th Order granting Plaintiff a 42 day extension of time to file his SAC until December 21, 2020, render the deadlines of the Scheduling Order (ECF 100) impossible to be met. As a threshold matter, the SAC would be filed *after* the Scheduling Order's deadline for service of requests for admission of November 26, 2020. (ECF 100). Further, presuming that the SAC is filed on about December 21, 2020, VNE anticipates the likelihood that it will respond by filing a further motion to dismiss two weeks later, on about January 4, 2021, which motion would not be fully briefed until February 17, 2021 at the earliest. Fed. R. Civ. P. 12(b)(6) and 15(a)(3); *see also* *See, e.g., Thomas v. New York City Dept. of Educ.*, No. 09-CV-5167 (SLT), 2010 WL 3709923 at *4 (E.D.N.Y. 2010) (Court granting motion to stay of all discovery, even pending defendant's unresolved motion to dismiss, finding that "[t]he claims in this case can ... be characterized as a moving target," and that "[u]ntil the motion to dismiss is decided, and the status of the claims resolved, this Court is no position to evaluate the discovery requests and objections thereto."). Even assuming VNE only files an Answer, that will only leave 25 days to conduct discovery on the allegations in the SAC before the prior January 29, 2021 deadline to complete fact discovery. (ECF 100).

Accordingly, Defendants respectfully seek clarification and confirmation of the following:

1. That the current Scheduling Order, including all fact and discovery deadlines therein, is vacated in its entirety;
2. That all discovery is stayed in its entirety;

¹ The 30th day falls on Saturday, November 7, 2020. Fed. R. Civ. P. 6(a)(1)(C).

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3. That any currently-pending discovery between Plaintiff and VNE be deemed withdrawn; and
4. That as required, the Court will enter a new Scheduling Order commensurate with any amended pleading filed by plaintiff at a later, appropriate time after the pleadings are settled.

This request for relief is presented in good faith, and for bonafide clarification of the current circumstances, and surely not made for any improper purpose.

We thank the Court for its time and consideration in this matter.

Respectfully submitted,



Howard A. Fried, Esq (Bar #HAF2114)
McGivney Kluger Cark, & Intoccia, P.C.
Attorneys for Defendants

cc via ECF to:

Plaintiff *Pro Se*,
Mr. Hao Zhe Wang

All discovery and ensuing deadlines are stayed pending filing of an amended complaint. Within 30 days after filing of an amended complaint (if any), the parties shall submit a joint proposed scheduling order.

SO ORDERED:

11/25/2020

HON. ROBERT W. LEHRBURGER
UNITED STATES MAGISTRATE JUDGE

